NTSB Order No.
EM-106

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 23rd day of March, 1984

JAMES S. GRACEY, Commandant United States Coast Guard,

v.

ROBERT WILLIAM FOEDISCH, Appellant.

Docket No. ME-95

OPINION AND ORDER

The appellant challenges an April 6, 1983 decision of the Vice Commandant (Appeal No. 2297) affirming a 6 month suspension of his merchant mariner's document (No. 537 408 707) ordered by Administrative Law Judge Roscoe H. Wilkes on July 13, 1981 following an evidentiary hearing which was completed on June 22, 1981.[1] The suspension was premised on findings sustaining a charge of misconduct based on a specification alleging that appellant, while in the service of the SS JOHN LYKES in the capacity of an ordinary seaman, had constructive possession of 12.5 grams of marijuana.[2] For the reasons that follow we have concluded that the order os suspension must be reversed because the evidence underlying the specification against the appellant was taken in violation of his constitutional right not to be subjected to an unreasonable search and seizure.[3] See Commandant v. Montgomery, NTSB Order EM-87 (1981).

The record establishes that on the morning of May 9, 1980, a "blitz" team of some ten Customs Service agents, apparently acting without consent, warrant or information that there might be contraband on the JOHN LYKES, boarded the vessel, then moored at

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[1] Copies of the decisions of the Vice Commandant (acting by delagtion and the law judge are attached.

[2] Evidence of wrongful possession of a narcotic drug is sufficient to establish a charge of misconduct under the Coast Guard's regulations. See 46 CFR 5.03-3.

[3] U.S. Const. Amend. IV.

the port of Stockton, California, and undertook to search the entire ship, including all crew staterooms, for contraband. [4] The search of appellant's stateroom, commenced while he apparently was asleep in his bunk, led to the discovery under his pillow of approximately 12.5 grams (or roughly three-sevenths of an ounce) of marijuana. Although the Drug Enforcement Agency, the Office of Investigation of the United States Customs, and the Stockton Police Department subsequently declined to prosecute the matter, appellant was immediately discharged from his employment on the JOHN LYKES and paid a civil penalty of $50 to the Customs Service. Subsequently, the Coast Guard, on November 26, 1980, instituted this proceeding to revoke his seaman document.[5]

On appeal to the Commandant from the law judge's finding that appellant was guilty, as charged, of misconduct, appellant by counsel argued, among other things, that the evidence obtained from his stateroom should have been suppressed as the result of an unconstitutional search and thus excluded from the hearing. The Commandant, without ruling on the lawfulness of the search, [6] concluded that in any even the evidence was admissible against the appellant because, in the Commandant's view, the rule of law which generally mandates exclusion of unlawfully seized evidence in subsequent criminal or civil proceedings did not require exclusion of such evidence in this suspension/revocation proceeding. Vice

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[4] Appellant had joined the ship on April 22, 1980 in Tacoma, Washington. From there it proceeded first to Long Beach and then to San Francisco before stopping at Stockton.

[5] In most instances under the Coast Guard's regulations, revocation of a document is mandatory for drug related misconduct. See 46 CFR 5.03-4. An exception, permitting and administrative law judge to enter an order "less than revocation," is authorized in cases involving marijuana where the law judge," "is satisfied that the use, possession or association [with the drug], was the result of experimentation byu the person and that the person has submitted satisfactory evidence that such use will not recur" (id.). The law judge in this case exercised his discretion under the exception to order a six-month outright suspension.

[6] In as much as the government has the burden of establishing the justification for a warrantless search, see, e.g., U. S. v. Brock, 667 F.2d 13118 1317-18(1982), we must view the Coast Guard's failure to rule on the question as a concession that the search was unlawful.

Commandant's decision at 3.[7] The Commandant's conclusion essentially reflects his belief that application of the exclusionary rule in this type of proceeding will not significantly further the rule's primary goal to deter future unlawful conduct by law enforcement officials. For the reasons discussed below we find the Coast Guard's position, at least as to this case, unpersuasive and not in accord with Board precedent or the current state of the law.

The Board has twice addressed the admissibility of unlawfully seized evidence in proceedings over which it exercises review authority -- one aviation and one marine -- and has in each instance upheld application of the exclusionary rule. See Administrator v. Danielson, NTSB Order EA-971 (1977) (precluding use by FAA in certificate revocation proceeding of evidence unlawfully seized by agents of the U. S. Customs Office and Drug Enforcement Administration) and NTSB Order EA-1044 (1977) (denying reconsideration of Order EA-971) and Commandant v. Montgomery, NTSB EM-87 (1981) (precluding Coast Guard's use of evidence unlawfully seized by U. S. Customs agents in proceeding to revoke seaman's document). In neither case, however, was the issue of deterrence the focus of the Board's analysis. While the Board in Danielson did express the opinion that a deterrent effect would be realized "since the Customs Office and the Drug Enforcement Administration [would be] prevented from fully administering their acts against respondent" (Order EA-971 at 9), the Board's rejection of the improperly seized evidence in that case clearly embraced the view than its admission raised administrative due process concerns. Id. at 8. In Montgomery, wherein the exclusionary rule was applied on the authority of Danielson, the deterrence element was again mentioned as a justification for excluding the invalid evidence, but it was not the subject of extended discussion in the context of an appeal in which the Coast had not filed a brief.[8] Assuming, nevertheless, for purpose of responding to the Coast Guard's contention that deterrence of future unlawful conduct by law enforcement officials is the only reason for excluding otherwise

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[7] The Commandant's opinion makes no attempt to distinguish this case from Commandant v. Montgomery, supra, in which the Board unequivocally "recognized the applicability of the exclusionary rule to the administrative hearings subject to our review on appeal" (id. at p.5); In fact, Montgomery is neither cited nor discussed in the Commandant's Decision. The Coast Guard on brief here (p.2) asserts, nevertheless, that the Commandant gave the Board's decision in Montgomery "careful consideration.

[8] Nor did the Coast Guard seek reconsideration of the Board's ruling in Montgomery.

probative evidence, we do not concur in the Coast Guard's view that the deterrence purpose of the exclusionary rule is not served by excluding from Coast Guard proceedings evidence unlawfully seized by Customs Service officers.

Although Danielson suggested that an intra-sovereign use of unlawfully seized evidence might never be admissible in proceedings before the Board, we recognize that some courts have concluded that such use is permissible, in a proceeding other than the one for which the evidence had been seized, where no significant deterrent effect would be achieved by its exclusion.[9] For example, such evidence has been admitted in probation revocation proceedings where the seizing officials did not have knowledge they were dealing with a probationer. See United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970). Such cases generally reflect the view that "the exclusionary rule can be properly and beneficially applied in those civil proceedings where it has a realistic prospect of achieving marginal deterrence." (Tirado v. Commissioner of Internal Revenue, 689 F. 2d 307, 314 (2d Cir. 1982)). We find such reasoning persuasive.

The court in Tirado articulated a standard for analyzing deterrence which in our judgment dictates reversal of the Commandant's decision in this case.[10] Under that standard, unlawfully seized evidence would not be excluded "where the evidence was not seized with the participation or collusion of, or in contemplation of use by, agents responsible for the proceeding in which the evidence is presented" (Tirado v. C.I.R., supra, 689 F.2d at 308). Because we believe that Customs agents are chargeable, as a matter of law, with knowledge that merchant mariners may have their license suspended or revoked by the Coast

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[9] In United States v. Janis, 428 U. S. 433 (1976), cited in Danielson, the Supreme Court upheld an instance of inter-sovereign (i.e., federal-state) use of unlawfully seized evidence, but the court did not resolve the validity of intra-sovereign usage such as occurred in this case.

[10] The Coast Guard brief relies heavily on the Second Circuit's decision in Tirado and United States v. Rea, 678 F. 2d 382 (2d Cir. 1982). In fact, about three-quarters of the nine or so pages the Coast Guard devotes to the exclusionary rule issue is extracted directly, essentially verbatim though with some minor rearrangement and selective editing, from those two decisions. (The extracted material is not, however, placed in quotes nor is the source of the material indicated in any way.) On the other hand, the rationales for the court's decision in Tirado is never adverted to in the brief.

Guard for drug-related offenses, the admission of evidence of drug possession these agents have obtained in Coast Guard disciplinary proceedings must be deemed to be among the uses contemplated by Customs agents in searching, lawfully or otherwise, mariner's staterooms.

The Customs Service and the Coast Guard historically have administered overlapping or coordinate authority with regard to U. S. shipping laws, collection of duties, apprehension of contraband, and other matters involving the movement of persons and cargoes into and out of the country. Moreover, while Customs has exercised its statutory authority in the area in a very limited way, both the Coast Guard and the Customs Service have, for nearly a century, shared responsibility for the "general superintendence of the commercial marine and merchant seamen of the United States" (46 U.S.C. §2).[11] In sum, the interests of the two agencies have been so closely interrelated by law and in fact over the years that it must be assumed that excluding from Coast Guard suspension/revocation proceedings evidence unlawfully seized by Customs agents will produce "marginal deterrence" within the meaning of the decision in Tirado. We so find.

It follows from the foregoing that the Coast Guard's use of the evidence seized unlawfully be the Customs agents cannot be sustained.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is granted, and

2. The order imposing a six-moth suspension of appellant's merchant mariner's document is reversed.

GOLDMAN, Vice Chairman, McADAMS,* and BURSLEY, Members of the Board, concurred in the above opinion and order. ENGEN, Member, and BURNETT, Chairman, filed dissents. * The vote of Member McAdams was cast prior to his retirement from the Board in December, 1983.

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[11] The recent codification of subtitle II of Title 46, U. S. Code, appears to have led to a separate statement of Coast Guard authority (46 U.S.C. 2103). However, Customs Service authority has not been curtailed. Coast Guard officers and petty officers are, by virtue of 19 U.S.C. §140(i), "officers of the customs" and "customs officers", at least for purposes of the Tariff Act of 1930. Customs officers may be authorized to perform functions normally performed by Coast Guard employees. Title 46 U. S. Code, passim.

Dissenting Opinion of Member Engen:

I respectfully dissent.

The Coast Guard suspended Seaman Foedisch's license. He had marijuana in his possession. The fact that the DEA, Customs, and the local police did not prosecute does not change the illegality of Foedisch's possession. They frequently do not prosecute where small amounts of drugs are involved. Are we to condone the use of marijuana by crewmembers of a ship? Would my fellow Board Members condone such use by a brakeman on a train? Search on a ship or airplane can be viewed differently from search in a building. The license suspension action by the USCG was, in my view, appropriate, and I would not vote other than to disapprove the Opinion and Order as it is now written. To approve the Opinion and Order would serve only to water down the authority of the ship's captain, who is responsible for the safety and good order and conduct on his ship, and the USCG, who is charged with regulatory responsibility.

BURNETT, Chairman, dissenting:

The Commandant determined that the exclusionary rule need not be applied in this type of proceeding since excluding the evidence would not significantly further the rule's primary goal to deter unlawful conduct by law enforcement officials. Because I agree with that determination, I would sustain the Coast Guard's suspension order.

As the majority acknowledges and the Coast Guard points out, neither Danielson or Montgomery focused on nor analyzed the issue of deterrence. I therefore do not believe those cases require that we disregard the Commandant's judgment that "the exclusion of evidence from a remedial proceeding concerning fitness to remain the holder of a merchant mariner's license or document would not serve to deter even a flagrantly unlawful Customs search" (Decision at 6). Absent some indication that the Commandant's appraisal is unfounded, the Coast Guard's assertion that no "marginal deterrence" would be achieved in this case by excluding from its disciplinary proceeding evidence seized by Customs agents does not appear unreasonable. I would, therefore, permit the use of the evidence in this proceeding, and I dissent from the majority's refusal to do so.